

EMPLOYMENT AND TRAINING ADMINISTRATION ADVISORY SYSTEM U.S. DEPARTMENT OF LABOR Washington, D.C. 20210	<b>CLASSIFICATION</b> LGBT
	<b>CORRESPONDENCE SYMBOL</b> OWI-OPDR
	<b>DATE</b> May 29, 2015

**ADVISORY:**           **TRAINING AND EMPLOYMENT GUIDANCE LETTER NO. 37-14**

**TO:**                   ONE-STOP CAREER CENTERS (currently branded as AMERICAN JOB CENTERS)  
STATE WORKFORCE AGENCIES  
STATE WORKFORCE ADMINISTRATORS  
STATE WORKFORCE LIAISONS  
STATE AND LOCAL WORKFORCE BOARD CHAIRS AND DIRECTORS  
STATE AND LOCAL EQUAL OPPORTUNITY OFFICERS  
STATE LABOR COMMISSIONERS  
WORKFORCE INNOVATION AND OPPORTUNITY ACT SECTION 166 INDIAN AND NATIVE AMERICAN GRANTEES  
WORKFORCE INNOVATION AND OPPORTUNITY ACT SECTION 167 MIGRANT AND SEASONAL FARMWORKER JOBS PROGRAM GRANTEES  
SENIOR COMMUNITY SERVICE EMPLOYMENT PROGRAM GRANTEES  
JOB CORPS CONTRACTORS  
RECIPIENTS OF DEPARTMENT OF LABOR FINANCIAL ASSISTANCE  
SUB-RECIPIENTS OF DEPARTMENT OF LABOR FINANCIAL ASSISTANCE

**FROM:**               PORTIA WU /s/  
Assistant Secretary  
Employment and Training Administration

NAOMI BARRY-PÉREZ /s/  
Director  
Civil Rights Center

**SUBJECT:**           Update on Complying with Nondiscrimination Requirements: Discrimination Based on Gender Identity, Gender Expression and Sex Stereotyping are Prohibited Forms of Sex Discrimination in the Workforce Development System

<b>RESCISSIONS</b> None	<b>EXPIRATION DATE</b> Continuing
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1. **Purpose.** The purpose of this Training and Employment Guidance Letter (TEGL) is to provide information to the public workforce system and other entities (including the “covered entities” listed in the “To” line above) that receive federal financial assistance under Title I of the Workforce Investment Act (WIA) and that will begin implementing Title I of the Workforce Innovation and Opportunity Act (WIOA) on July 1, 2015, as well as education and training programs or activities receiving Department of Labor financial assistance, regarding the prohibitions on discrimination based on gender identity, gender expression, and sex stereotyping. Lesbian, gay, bisexual and transgender (LGBT) individuals experience unemployment and employment discrimination at significantly higher rates compared to the rest of the American population, making it particularly important that they have full access to the services provided by the public workforce system, to help overcome the employment-related barriers they encounter.<sup>1</sup> This TEGL and related attachments explain the legal authority for these obligations, give some examples of prohibited discrimination, and suggest ways to prevent, identify, and address discrimination.
  
2. **References.** The nondiscrimination provisions that apply to the public workforce system prohibit discrimination on the basis of sex, among other bases. These provisions prohibit intentional discrimination as well as actions, policies or practices, which, though neutral on their face, have a disproportionate impact on a protected class and cannot be justified as job related and consistent with business necessity. Although gender identity is not an explicitly protected basis under the applicable federal laws, discrimination based upon gender identity, gender expression, and sex stereotyping has been interpreted to be a form of prohibited sex discrimination, including under laws that apply to federally financially assisted employment, training, and education programs and activities.
  - a. The Workforce Investment Act (WIA), 29 U.S.C. 2801 et seq., is the key source of federal assistance for state and local workforce development activities. Section 188 of the Workforce Innovation and Opportunity Act (WIOA) retains the same non-discrimination provisions currently found in Section 188 of WIA, and as the workforce system transitions to operations under this new law, this guidance will remain in effect. The relevant nondiscrimination provision in WIA states that no “individual shall be excluded from participation in, denied the benefits of, subjected to discrimination under, or denied employment in the administration of or in connection with, any such program or activity” on the basis of race, color, religion, sex, national origin, age, disability, or political affiliation or belief, among other bases. 29 U.S.C. 2938(a)(2). The regulations implementing this provision, administered and enforced by the Department of Labor’s Civil Rights Center (CRC), apply to all programs and activities that are operated by One-Stop partners as part of the One-Stop delivery system. 29 C.F.R. 37.2(a)(2). Similarly,

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<sup>1</sup> See, e.g., Injustice at Every Turn: A Report of the National Transgender Discrimination Survey, National Center for Transgender Equality, National Gay and Lesbian Task Force (2011), available at <http://endtransdiscrimination.org/report.html>; Documented Evidence of Employment Discrimination & Its Effects on LGBT People, The Williams Institute, (2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-20111.pdf>.

under the Wagner-Peyser Act regulations, states are required to assure nondiscrimination regarding any services or activities authorized under that Act. 20 C.F.R. 652.8(j)(1).

The WIA nondiscrimination regulations prohibit recipients from using any method that has the purpose or effect of subjecting individuals to discrimination on a prohibited ground due to the recipient's administration of programs providing aid, benefits, services, training, or facilities. 29 C.F.R. 37.6. In addition, the Wagner-Peyser Act regulations specifically require states to "[a]ssure that discriminatory job orders will not be accepted, except where the stated requirement is a bona fide occupational qualification (BFOQ)." 20 C.F.R. 652.8(j)(2).

The CRC, which is charged with enforcing Section 188 of WIA<sup>2</sup> and its implementing regulations, interprets the prohibition against sex discrimination consistent with the U.S. Equal Employment Opportunity Commission's interpretation of sex discrimination under Title VII of the Civil Rights Act of 1964 and the U.S. Department of Education's interpretation of sex discrimination under Title IX of the Education Amendments of 1972, as described below.<sup>3</sup> These nondiscrimination obligations apply to recipients of WIA Title I funding and programs and activities that are part of the public workforce system and are operated by One-Stop (also known as American Job Centers) partners, to the extent the programs are being conducted as part of the One-Stop delivery system.

- b. Title VII of the Civil Rights Act of 1964, as amended (Title VII), 42 U.S.C. 2000e et seq., prohibits employment discrimination based on race, color, religion, sex, and national origin. Entities within the public workforce system, such as the State Workforce Agencies and One-Stop Career Centers (currently branded as American Job Centers), may be regarded as "employment agencies" under Title VII.<sup>4</sup> Title VII prohibits employment agencies from failing or refusing to refer an individual for employment or otherwise to discriminate against any individual based on race, color, religion, sex, or

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2 This document refers to Section 188 of WIA. Section 188 of Workforce Innovation and Opportunity Act (WIOA) was signed into law on July 22, 2014 and it supersedes Section 188 of WIA. In general, WIOA takes effect on July 1, 2015, which is the first full program year after it was enacted. Enactment of WIOA in no way changes the nondiscrimination and equal opportunity obligations discussed in this TEG.

3 *See, e.g.*, 29 CFR 37.10(c) ("In any investigation or compliance review, the [CRC] Director must consider . . . EEOC regulations, guidance and appropriate case law in determining whether a recipient has engaged in an unlawful employment practice"); 29 CFR 37.13 ("The [CRC] Director will make any rulings under, or interpretations of, the nondiscrimination and equal opportunity provisions of WIA or [29 CFR part 37]").

4 *See* 42 U.S.C. 2000e(c) (defining "employment agency" as "any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer"); EEOC Decision No. N-917.002, 1991 WL 11665181, at \*1-2 & n.1 (Sept. 20, 1991). EEOC COMPLIANCE MANUAL, SEC. 2, THRESHOLD ISSUES, at 2-III.B.1.b (rev. 2000), *available at* <http://www.eeoc.gov/policy/docs/threshold.html>; EEOC POLICY GUIDANCE, NO. N-917.002, WHAT CONSTITUTES AN EMPLOYMENT AGENCY UNDER TITLE VII, HOW SHOULD CHARGES AGAINST EMPLOYMENT AGENCIES BE INVESTIGATED, AND WHAT REMEDIES CAN BE OBTAINED FOR EMPLOYMENT AGENCY VIOLATIONS OF THE ACT? *available at* 1991 WL 11665181, at \*1-2 & n.1 (Sept. 20, 1991). *See, however*, 47 U.S.C. 230, which may shield Internet-based Job Banks from civil liability for posting content created by third parties.

national origin. 42 U.S.C. 2000e-2(b).<sup>5</sup> The U.S. Equal Employment Opportunity Commission (EEOC), the Federal agency with lead responsibility for interpreting Title VII, has issued a number of decisions concluding that LGBT individuals may have claims for sex discrimination when they allege discrimination involving sex-stereotypes and gender norms.<sup>6</sup> These decisions relied, in part, on a previous decision of the U.S. Supreme Court that held discrimination based on an individual's perceived or actual failure to conform with stereotypical gender norms constitutes discrimination because of sex within the meaning of Title VII.<sup>7</sup> In addition, several federal courts and the EEOC have held that discrimination against an individual because that person is transgender (also known as gender identity discrimination) may be discrimination because of sex.<sup>8</sup>

- c. Title IX of the Education Amendments of 1972, as amended (Title IX), 20 U.S.C. 1681 prohibits discrimination on the basis of sex under any education program or activity receiving federal financial assistance. The U.S. Department of Education, which is the agency that takes the lead on enforcing Title IX, has interpreted Title IX's prohibition against discrimination on the basis of sex as including both sex stereotyping and gender identity.<sup>9</sup> As many entities within the public workforce system are federally-funded education programs and activities, this interpretation also applies to these programs.
- d. Protection Under State or Local Laws. Many state and local laws explicitly prohibit discrimination based on sexual orientation or gender identity, along with other types of discrimination. As of the date of this Guidance and according to the Human Rights Campaign ([www.hrc.org/state\\_maps](http://www.hrc.org/state_maps)), 22 states and the District of Columbia prohibit employment discrimination based on sexual orientation, with a majority of those States also extending protection based on gender identity. An additional 12 states offer protections for sexual orientation or gender identity in the public sector. The regulations

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<sup>5</sup> The Office of Federal Contract Compliance Programs (OFCCP) administers Executive Order 11246, which prohibits covered federal contractors, federally-assisted construction contractors, and covered subcontractors from discriminating in employment decisions on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin. See Executive Order 11246, as amended. OFCCP enforces the nondiscrimination requirements of Executive Order 11246 in accordance with Title VII. The Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (VEVRAA), which requires covered federal government contractors to post certain categories of job announcements in the state workforce agency job bank or with American Job Centers, also is administered and enforced by OFCCP. See 38 U.S.C. 4212(a)(2). Nothing in this TEGL is inconsistent with the obligations of federal contractors and subcontractors under Executive Order 11246, as amended, Section 503 of the Rehabilitation Act, as amended, and 38 U.S.C. Section 4212, the Vietnam Era Veterans' Readjustment Assistance Act, as amended.

<sup>6</sup> See Article, *What you Should Know about EEOC and the Enforcement Protections for LGBT Workers*, issued November 5, 2014, available at

[http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement\\_protections\\_lgbt\\_workers.cfm](http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm).

<sup>7</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

<sup>8</sup> See, *supra*, *What You Should Know about EEOC and the Enforcement Protections for LGBT Workers* (discussing EEOC cases); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 574 (6th Cir. 2004); *Schroer v. Billington*, 577 F. Supp.2d 293 (D.D.C. 2008).

<sup>9</sup> U.S. Department of Education, Office of Civil Rights, "Questions and Answers on Title IX and Sexual Violence" at 5, available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>; U.S. Department of Education, Office of Civil Rights, "Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities," at 25, Dec. 1, 2014, available at <http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf>.

implementing WIA Section 188 state that they “do not preempt consistent State and local requirements.” Therefore, state or local laws that provide greater protections on the basis of sexual orientation or gender identity than WIA Section 188, 29 CFR part 37, and the other Federal civil rights laws mentioned herein are fully consistent with those Federal legal provisions.

3. **Action Requested.** One-stop centers should ensure that they are providing equal access to services. As such, DOL is requesting that one-stop centers and other entities in the public workforce system take the following actions.
  - a. One-stop centers and other entities in the public workforce system should use Attachment 2 when reviewing their existing policies and procedures and make any changes necessary to implement the guidance discussed in this directive.
  - b. Workforce System staff should familiarize themselves with Attachment 1, “Key Terminology for Working with Lesbian, Gay, Bisexual, and Transgender Persons.” Understanding and using this terminology can facilitate more effective communication with LGBT customers and employees of the workforce system.
  - c. Equal Opportunity (EO) Officers should carefully investigate complaints by customers or employees alleging gender identity or sex stereotyping discrimination to determine whether discrimination has occurred on the basis of sex, as discussed in Attachment 2.
  - d. Where State or local laws explicitly bar discrimination based on gender identity and/or sex stereotyping, EO Officers should advise customers or employees that additional State and local laws may also cover their claims, and how to file a complaint.
4. **Inquiries.** Inquiries about civil rights issues in the public workforce system should be addressed to CRC, by phone at 202-693-6500 (voice); by relay at 800-877-8339 (TTY/TDD); or by e-mail at [CivilRightsCenter@dol.gov](mailto:CivilRightsCenter@dol.gov). Complaints alleging discrimination by entities in the system may be filed with CRC by postal mail, e-mail, or fax, addressed to Director, Civil Rights Center, U.S. Department of Labor, 200 Constitution Avenue, NW, Room N-4123, Washington, DC 20210, [CRCEXternalComplaints@dol.gov](mailto:CRCEXternalComplaints@dol.gov), 202-693-6505 (fax). Further information about the discrimination complaint process is available on CRC’s website at <http://www.dol.gov/oasam/programs/crc/external-enforc-complaints.htm>.

## 5. **Attachments.**

Attachment 1: Key Terminology for Working with Lesbian, Gay, Bisexual, and Transgender Persons

Attachment 2: Further Guidance Regarding Forms of Sex Discrimination Against LGBT Individuals